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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY:

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NY NOURN,

Petitioner,

vs.

M. LATTIMORE,

Respondent.

CASE NO. 09-cv-2456 BEN (WVG)

ORDER ADOPTING REPORT AND
RECOMMENDATION AND
DENYING WRIT OF HABEAS
CORPUS UNDER 28 U.S.C. § 2254

INTRODUCTION

Petitioner Ny Nourn, a state inmate proceeding pro se, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (the "Petition"), alleging (1) the double jeopardy clause was violated when the prosecutor argued facts to which she had previously been acquitted; (2) the prosecutor presented a legally untenable theory of liability; (3) the jury was improperly instructed; (4) there was insufficient evidence to support her conviction; and (5) Petitioner's counsel provided ineffective assistance because he failed to object to the double jeopardy violation or argue the legal untenability of the prosecution's theory at trial. (Docket No. 1.) Respondent filed an Answer, and Petitioner filed a Traverse. (Docket Nos. 12, 14.)

On June 14, 2010, Magistrate Judge William V. Gallo issued a Report and Recommendation, recommending that the Petition be denied. (Docket No. 15.) On July 12, 2010, Petitioner filed an Objection to the Report and Recommendation. (Docket No. 16.) For the reasons stated below, the Court **ADOPTS** the Report and Recommendation and **DENIES** Petitioner's Petition for Writ of

1 Habeas Corpus under 28 U.S.C. § 2254.

2 **FACTUAL BACKGROUND**

3 A summary of the pertinent facts as found by the state appellate court (Lodgement 6 at 3-8) is
4 as follows:

5 On December 23, 1998, David Stevens' body was found in a burning car. An autopsy revealed
6 that Stevens had been fatally shot twice in the head before his body was burned. The case was
7 unresolved for three years. However, in November 2001, Petitioner contacted the San Diego Police
8 Department and confessed to her role in the murder.

9 As part of her confession, Petitioner stated the following: In August 1998, when she was 17
10 years old, Petitioner met Ronald Barker through the internet. They quickly developed an intimate
11 relationship and continued that relationship at all relevant times herein. In November 1998, however,
12 Petitioner began working at the Perfect Match dating service. While working at Perfect Match,
13 Petitioner developed an intimate relationship with her boss, David Stevens.

14 On December 22, 1998, after returning home from a date with Stevens, Petitioner encountered
15 Barker. Barker asked where Petitioner had been. At first, Petitioner said she had been shopping, but
16 then admitted that she had "slept with [her] boss." Petitioner then told Barker that Stevens had coaxed
17 her into having sex with him, but then changed her story and said Stevens had raped her. Barker
18 replied, "I'm gonna kill him," and told Petitioner to take him to Stevens' apartment so that he could
19 confront him. Petitioner agreed.

20 On their way to Stevens' apartment, Barker and Petitioner had sex in the back seat of his car.
21 Barker suggested that he and Petitioner end their relationship. Petitioner begged him not to do so, to
22 which Barker responded, "[o]nly way you stay with me is if you kill David or I kill David." Petitioner
23 replied, "I do anything you say." Barker then said he needed to go to his house to get his gun.
24 Petitioner followed him there.

25 Barker told Petitioner to call Stevens and tell him she was stranded on the freeway. Petitioner
26 agreed. However, when Petitioner called, Stevens did not answer. Therefore, Barker and Petitioner
27 drove to Stevens' apartment with the plan of telling Stevens that Petitioner's car had broken down and
28 she needed him to follow her to her car. Barker would pretend to be Petitioner's brother.

1 When they arrived at Stevens' apartment, Petitioner called him on the intercom and told him
2 the story. The three of them then drove to a residential area. When Stevens pulled over and asked
3 "Where's the car," Barker grabbed Stevens by the neck and pointed the gun at his head. Barker said,
4 "How does it feel to sleep with someone's girlfriend?" Stevens replied, "[D]on't do this," and
5 Petitioner said "No, no." Barker then fatally shot Stevens twice in the head. Petitioner assisted Barker
6 in moving Stevens' car and later setting it on fire with Stevens' body inside. For the following three
7 years, Barker and Petitioner continued their relationship.

8 Petitioner stated she was afraid Barker would kill her if she did not go along with the plan.
9 Petitioner stated she liked Stevens very much and denied wanting to see him hurt or killed. Petitioner
10 believed Barker only intended to "confront" Stevens. Petitioner admitted Barker never physically
11 abused her prior to Stevens' murder, although she said Barker slapped her on the night of the murder.
12 Petitioner also admitted Barker did not know where Stevens lived and only her assistance led Barker
13 to him. Petitioner admitted she was alone with Stevens several times as the plot unfolded and had
14 several opportunities to stop the murder or warn Stevens, but did not do so. At trial, three
15 psychologists testified that Petitioner suffered from Battered Women's Syndrome before, during and
16 after the murder. However, one psychologist admitted that, at the time of the murder, Petitioner was
17 not so subjugated by Barker that she did not feel free to defy him by dating Stevens.

18 In her Objection to the Report and Recommendation, Petitioner does not contest the above
19 factual summary, other than to contend that on the night of the murder she did not have consensual sex
20 with Barker; she was raped. (Obj., 2, 6.) Absent clear and convincing contrary evidence, however,
21 the factual determinations of a state court are presumed correct on habeas review. 28 U.S.C. §
22 2254(e)(1). Petitioner has not presented clear and convincing evidence that the state court's factual
23 determinations are incorrect. In fact, Petitioner admits that, at the time of her confession, she did not
24 tell the police that Baker raped her on the night of the murder; rather, she indicated that the sex was
25 consensual. (Obj., 10.) Accordingly, the Court adopts the state appellate court's factual findings.

26 PROCEDURAL BACKGROUND

27 In 2003, a jury returned a guilty verdict of first degree murder against Petitioner and found true
28 a special circumstances lying-in-wait allegation. The state appellate court ultimately reversed the first

1 degree murder conviction based on ineffective assistance of counsel and reversed the special
2 circumstance finding based on instructional error.

3 In November 2007, Petitioner was again tried on charges of murder and arson. Prior to trial,
4 the court dismissed the special circumstances lying-in-wait allegation. After the close of the
5 prosecution's case, the trial court granted Petitioner's motion for acquittal on the first degree murder
6 charge. The jury found Petitioner guilty of second degree murder and not guilty of arson. Petitioner
7 was sentenced to 15 years to life. Petitioner has exhausted her state court remedies.

8 DISCUSSION

9 Petitioner asserts five grounds for relief: (1) the double jeopardy clause was violated when the
10 prosecutor argued facts to which she had previously been acquitted; (2) the prosecutor presented a
11 legally untenable theory of liability; (3) the jury was improperly instructed; (4) there was insufficient
12 evidence to support her conviction; and (5) Petitioner's counsel provided ineffective assistance
13 because he failed to object to the double jeopardy violation or argue the legal untenability of the
14 prosecution's theory at trial.

15 As correctly outlined in the Report and Recommendation, federal habeas relief may only be
16 granted when state court proceedings "(1) resulted in a decision that was contrary to, or involved an
17 unreasonable application of, clearly established Federal law, as determined by the Supreme Court of
18 the United States; or (2) resulted in a decision that was based on an unreasonable determination of the
19 facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The
20 Supreme Court has clarified that even an erroneous or incorrect application of clearly established
21 federal law does not support a habeas grant, unless the state court's application was "objectively
22 unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Where there is no reasoned decision
23 from the state's highest court, the Court "looks through" to the underlying appellate court decision.
24 *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991). If the dispositive state court opinion does not
25 "furnish a basis for its reasoning," federal habeas courts must conduct an independent review.
26 *Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000) (overruled on other grounds by *Lockyer*, 538
27 U.S. at 75-76).

I. DOUBLE JEOPARDY

Petitioner claims that double jeopardy principles were violated when the prosecution argued facts to which she was acquitted. The Report and Recommendation rejected this claim, finding that although the trial court granted Petitioner's motion to acquit, the trial court specifically carved out from its order second degree murder and lesser included offenses like manslaughter; the order granting the motion to acquit was limited to first degree murder only. The Report and Recommendation, therefore, concluded the Court of Appeal did not err in finding that double jeopardy principles were not violated.

It is well-established that a party objecting to a Report and Recommendation must cite specific instances of error in the Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2); *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007) ("Section 636(b)(1) does not countenance a form of generalized objection to cover all issues addressed by the magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized, as the statute directs the district court to review only *those portions* of the report or *specified* proposed findings or recommendations *to which objection is made.*") (internal citations and quotations omitted) (emphasis in the original). As the Fourth Circuit stated,

[A] party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection. . . . To conclude otherwise would defeat the purpose of requiring objections. We would be permitting a party to appeal any issue that was before the magistrate judge, regardless of the nature and scope of objections made to the magistrate judge's report. Either the district court would then have to review every issue in the magistrate judge's proposed findings and recommendations or courts of appeals would be required to review issues that the district court never considered. In either case, judicial resources would be wasted and the district court's effectiveness based on help from magistrate judges would be undermined.

Id. at 622; *see also* Fed. R. Civ. P. 72(b)(2) (requiring objecting party to file "specific written objections to the proposed findings and recommendations").

Here, Petitioner does not make any specific objections to the Report and Recommendation's finding on double jeopardy. As Petitioner does not identify the portions of the Report and Recommendation that purportedly misapply the law to facts or fail to consider the

1 significance of Plaintiff's facts, the Court overrules Plaintiff's objection. Accordingly, the Court
2 adopts the finding in the Report and Recommendation and denies Petitioner's double jeopardy
3 claim.

4 II. UNTENABLE LEGAL THEORY

5 Petitioner next claims her conviction for second degree murder is premised on an
6 impermissible theory of law. Specifically, Petitioner claims a second degree murder conviction cannot
7 be based on a charge of aiding and abetting a person convicted of first degree murder since the
8 requisite intent between first and second degree murder is different. The Report and Recommendation
9 rejected this claim, noting that although an aider and abettor must share the intent of the perpetrator,
10 the aider and abettor need only know of the perpetrator's criminal purpose and give aid or
11 encouragement with the intent of facilitating the perpetrator's commission of the crime. (Report, 13.)
12 The jury found that Petitioner demonstrated the requisite intent and aid to Barker. Additionally, the
13 Report and Recommendation noted that no Supreme Court law demonstrates that a second degree
14 murder conviction cannot rest on aiding and abetting a second degree murder, for which the perpetrator
15 was convicted of first degree murder. Accordingly, the Report and Recommendation found that the
16 Court of Appeal's denial of Petitioner's claim was neither contrary to, nor an unreasonable application
17 of, clearly established Supreme Court law.

18 Petitioner objects to this finding, arguing she was young at the time of the murder, was acting
19 under duress, grew up in a culture that required woman to be subservient to men, and the Battered
20 Woman's Syndrome negates malice. (Obj., p. 6-11.) Petitioner does not cite authority supporting
21 these arguments or otherwise showing that these facts, even if true, demonstrate that a second degree
22 murder conviction cannot rest on aiding and abetting a second degree murder, for which the perpetrator
23 was convicted of first degree murder. To the extent Petitioner argues that the prosecution was
24 unnecessarily "harsh to her," Petitioner fails to cite support for this argument or to cite legal authority
25 showing habeas relief is proper based thereon. To the extent Petitioner's arguments relate to the jury's
26 factual findings, those arguments likewise fail, as detailed below.

27 Accordingly, the Court adopts the well-reasoned analysis set forth in the Report and
28 Recommendation and denies Petitioner's claim.

1 III. JURY INSTRUCTIONS

2 Petitioner next claims habeas relief should be granted because the jury instructions lacked “the
3 mens rea elements of aider and abettor liability as to whether Petitioner shared Barker’s murderous
4 intent.” (Traverse, 5; Obj., 13.)

5 As outlined in the Report and Recommendation, however, the trial court did instruct the jury
6 on the mental state necessary to convict Petitioner of second degree murder. (Report, 13-14.)
7 Specifically, the trial court instructed, “someone aids and abets a crime if. . . she knows of the
8 perpetrator’s unlawful purpose, and. . . she specifically intends to, and does, in fact, aid, facilitate,
9 promote, encourage or instigate the perpetrator’s commission of the crime.” (CALCRIM 401, RT at
10 705; CT at 373.) The trial court also instructed the jury on the malice required for second degree
11 murder: “[a] defendant acts with malice or has that state of mind if, one,. . . she intentionally
12 committed an act; two, the natural consequences of the act were dangerous to human life; three, at the
13 time. . . she acted. . . she knew the act was dangerous to human life; and four,. . . she deliberately acted
14 with conscious disregard for human life.” (CALCRIM 520; RT at 707; CT at 375).

15 A federal habeas court may overturn a conviction “where the instruction ‘by itself so infected
16 the entire trial that the resulting conviction violates due process.’” *Quigg v. Crist*, 616 F.2d 1107, 111
17 (9th Cir. 1980) (quoting *Cupp v. Naughton*, 414 U.S. 141, 147 (1973)). Where an instruction omits
18 a required element of the offense, the Ninth Circuit has recognized that habeas relief may be proper.
19 *Keating v. Hood*, 191 F.3d 1053, 1061 (9th Cir. 1999). That situation is not present here. As found
20 by the Report and Recommendation, the jury instruction properly stated that Petitioner had to know
21 of Barker’s unlawful purpose to murder Stevens, and Petitioner must have intended to aid, and actually
22 did aid, Barker in that purpose. (Report, 16, citing CALCRIM 401 (excerpt); RT at 705; CT at 373.)
23 Accordingly, Petitioner’s claim that the jury was not properly instructed on intent lacks merit.
24 Therefore, the Court adopts the Report and Recommendation’s well-reasoned finding that the aiding
25 and abetting jury instructions did not violate Petitioner’s due process rights. To the extent Petitioner
26 argues there was insufficient evidence for the jury to convict her of the charges, that argument likewise
27 lacks merit, as detailed below.
28

1 IV. JURY'S FINDINGS OF FACT

2 Petitioner claims there was insufficient evidence for the jury to convict her of second degree
3 murder. The state appellate court denied this claim, finding that based on the Petitioner's statements
4 to the police, there was substantial evidence that Petitioner knew Barker intended to kill Stevens and
5 participated in his plan. Additionally, Barker was only able to complete the crime with Petitioner's
6 assistance, and Petitioner lured Stevens out of his home and led him to Barker. Petitioner also
7 acknowledged she had numerous opportunities to prevent the crime; however, she failed to warn
8 Stevens or take other preventive actions. Thus, there was sufficient evidence for the jury to convict
9 Petitioner of second degree murder.

10 In a sufficiency of evidence claim, a federal habeas court must determine whether "no rational
11 trier of fact could [have found] guilt beyond a reasonable doubt." *Wright v. West*, 505 U.S. 277, 290
12 (1992). The Court must view all evidence in the light most favorable to the prosecution, and must
13 presume the trier of fact resolved conflicting evidence in favor of the prosecution. *Wright*, 505 U.S.
14 at 296-97. The testimony of a single witness is sufficient to uphold a conviction, *Bruce v. Terhune*,
15 376 F.3d 950, 957-58 (9th Cir. 2004), and a federal habeas court cannot redetermine the credibility of
16 witnesses whom the court has not observed. *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).
17 Rather, "[t]he reviewing court must respect the province of the jury to determine the credibility of
18 witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming
19 that the jury resolved all conflicts in a manner that supports the verdict." *Jones v. Wood*, 114 F.3d
20 1002, 1008 (9th Cir. 1997).

21 The Report and Recommendation sets forth a thorough and detailed analysis of the evidence
22 that supports the jury's verdict. (Report, 20-21.) In her Objection, Petitioner contends this evidence
23 is still not sufficient because the jury failed to account for her cultural background which allegedly
24 requires her to be subservient to men, and failed to fully account for her Battered Woman's Syndrome.
25 (Obj., 6-17.) However, Petitioner fails to cite authority showing that such factors, even if true,
26 supercede all other evidence weighing in favor of conviction, as Petitioner contends. After conducting
27 a de novo review, the Court adopts the well-reasoned analysis set forth by the Magistrate Judge and
28 finds that ample evidence supports Petitioner's conviction. Accordingly, the Court denies Petitioner's

1 claim.

2 **V. ASSISTANCE OF COUNSEL**

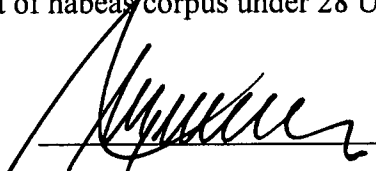
3 Petitioner claims her counsel rendered ineffective assistance on two grounds: (1) her counsel
4 failed to object during trial on the grounds that double jeopardy principles were violated, and (2) her
5 counsel failed to object to the use of an allegedly untenable theory of liability. Because the Court finds
6 that the principles of double jeopardy were not violated and the theory of liability was not legally
7 untenable, the Court need not address Petitioner's claim. Nevertheless, the Court notes that the Report
8 and Recommendation conducted a thorough analysis under *Strickland v. Washington*, 466 U.S. 668
9 (1984) and concluded that Petitioner was not denied effective assistance of counsel. In her Objection,
10 Petitioner did not object to this finding. For this additional reason, a de novo review of Petitioner's
11 claim is not necessary. 28 U.S.C. § 636(b)(1). Rather, the Court adopts the Report and
12 Recommendation and denies Petitioner's claim for ineffective assistance of counsel.

13 **CONCLUSION**

14 For the reasons set forth above, the Court ADOPTS the Report and Recommendation in its
15 entirety and DENIES Petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254.

16 **IT IS SO ORDERED.**

17 Date: September 15, 2010


18 Hon. Roger T. Benitez
19 United States District Court Judge
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